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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

UNITED STATES OF AMERICA, ex rel. LLOYD ELDON MILLER, JR.,

Petitioner,

vs.

FRANK J. PATE, Warden of the Illinois State Penitentiary, Joliet, Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Justices Of The Supreme Court Of The United States:

PROCEEDINGS BELOW.

In 1956, petitioner, Lloyd Eldon Miller, Jr., relator, was convicted of murder and sentenced to death by the Circuit Court of Hancock County, Illinois. The conviction was affirmed by the Supreme Court of Illinois; *People* v. *Miller,* 13 Ill. 2d 84, 148 N.E. 2d 455 (1958).[1] In August,

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[1] The relevant opinions are reproduced in an appendix in a separate acco binder. Nine copies are supplied.

1963, petitioner sought commutation before the Illinois Pardon and Parole Board. Commutation was denied but in the course of the hearings facts came to light for the first time which established that petitioner's constitutional rights had been seriously infringed in the 1956 trial. Execution was set for August 23. The Supreme Court of Illinois denied a stay to allow time for state court proceedings. Based upon these facts, however, petitioner filed a *habeas corpus* application in the United States District Court for the Northern District of Illinois and obtained a stay seven hours before he was to die. After a trial on the merits in the District Court, petitioner was ordered retried within a limited time or released. 226 F. Supp. 541 (1963). The Seventh Circuit reversed on February 20, 1965, and denied a timely petition for rehearing on April 9, 1965, 342 F. 2d 646 (1965).[1] Petitioner asks *certiorari*. Petitioner has met the requirements of 28 U.S.C. 2254 regarding state remedies. See p. 29, *infra*.

JURISDICTION.

The jurisdiction of this Court to entertain the petition for a writ of *certiorari* is based on 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED FOR REVIEW.

Is it a violation of the constitutional right to a fair trial guaranteed by the due process clause of the Fourteenth Amendment, by the right to counsel clause of the Sixth and by the compulsory process for witnesses clause of the Sixth:

1. (a) To suppress physical evidence almost exculpatory in character;

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[1] There were other efforts at relief before the facts here relied on came to light. The chief attempt was by *habeas corpus*. *Miller* v. *Ragen*, 300 F. 2d 414 (C.A. 7th, 1962), *cert.* den. 371 U.S. 898 (1962) (one dissent).

(b) As a device to obtain a confession, while interrogating a prisoner, to inform him falsely that such physical evidence implicates him;

(c) To represent falsely to the Court and the jury that stains on a crucial garment are blood stains when the stains were known to be paint?

2. (a) Knowingly to use as a key prosecution witness an untrustworthy person who subsequently admitted, under oath, that her trial testimony was perjured;

(b) Knowingly to permit a key prosecution witness to lie on a material issue?

3. To obstruct defense counsel from interviewing prospective witnesses where the effect was to deprive petitioner of alibi witnesses?

4. To hold petitioner *incommunicado* for over 52 hours, without counsel, until the prosecutor obtained a confession, meanwhile refusing to permit petitioner to call his family and telling him falsely his family did not want to see him?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part as follows:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The exhaustion provision of the *habeas corpus* statute, 28 U.S.C. 2254, reads:

"An application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT OF THE CASE.

The Court of Appeals set aside *habeas corpus* relief granted petitioner by the District Court.

The District Court had before it the 1956 trial proceedings and the Parole Board transcript. In addition, the Court took evidence. This full record has been certified to this Court.

"R. . . ." is a reference to the record in the District Court. (Three printed volumes, yellow cover.)

"Abst. . . ." is a reference to the abstract before the Supreme Court of Illinois and is part of the record here. (One printed volume, grey cover, one copy only filed here.)

A single set of the exhibits has been certified to and transmitted to this Court in an Acco binder.

The facts are:

(a) The hair.

On Saturday, November 26, 1955, at about 4:30 p.m., Janice May, an eight-year-old girl, was found seriously injured under a mining car near a railroad track in Canton, Illinois. She was taken to a hospital where she died at 5:47 p.m. At 6:20 p.m. Dr. Raymond J. Mercy, a licensed physician and surgeon (Abst. 90) and county coroner, examined the body while still on the operating table. At 2:00 p.m. on November 28, Forrest Litterly, a chemist at the Illinois State Bureau of Criminal Identification in Springfield, received a vial bearing the notations "Janice May—11/26/55, Dr. R.J.M." These were, respectively, the name of the deceased, date of the crime and autopsy, and initials of the coroner. The vial contained "two rolled Kleenex used to obtain a vaginal smear from Janice May. On one of the Kleenex a hair was found" (Report of Forrest Litterly, dated December 7, 1955) (Pet. Ex. 6).

On Monday, November 28, 1955, at 8:00 p.m. petitioner was arrested. The police took a sample of his pubic hair which was delivered to Litterly at 6:00 p.m. on November 29 (Pet. Ex. 6, p. 2). Litterly's report states that he compared microscopically the hair on the Kleenex with the sample of petitioner's pubic hair. Litterly's report states:

"No similar characteristics between the two hair samples were observed and it is the opinion of the examiner that the common origin of the two hair samples is not probable."

Petitioner testified at the 1956 trial before the Court that he was shown the hairs on the night of November 29-30 "in a microscope room" and told by the police that the hair belonged to him (Abst. 162). This testimony was never denied by the prosecution. The prosecution never revealed to the Court or jury at the 1956 trial that it had determined that the hair was not petitioner's.

After several lengthy interrogations, at approximately 12:15 a.m., Thursday, December 1, petitioner signed a purported confession. He was taken to the County Jail at Pekin where he immediately repudiated the confession to the sheriff (Abst. 417). (Petitioner's testimony on this point was not contradicted by the prosecution.) From that day to this, petitioner has consistently repudiated this confession and denied his guilt.

Months prior to the 1956 trial petitioner moved for permission to make a scientific examination of the physical evidence in the hands of the prosecution (Abst. 9). This motion was denied (Abst. 194). In fact, Mr. William Malmgren, petitioner's counsel, saw the physical evidence only on one occasion (R. 194). For the views of the Supreme Court of Illinois affirming the denial see 148 N.E. 455 at 469.

Litterly was a prosecution witness at the 1956 trial. He was not, however, asked by the prosecution to inform the Court or jury of the facts regarding the hair. His testimony was confined to other matters.

Not until 1963 did petitioner learn the facts regarding the hair. Shortly before trial in the District Court the prosecution produced Litterly's 1955 report in response to a subpoena duces tecum. Petitioner then learned for the first time that the prosecution knew the hair was not his and had lied to him regarding it during the interrogation preceding the confession.

(b) The jockey shorts.

On November 29, 1955, the police found a heavily stained pair of jockey shorts in the Van Buren flats, an abandoned building, in Canton (Abst. 262) and a jacket in a creek (Abst. 240). The confession identifies both as petitioner's and states that they had been discarded in the places where the police had previously found them. The police determined that the heavy stains on the shorts were paint (R. 583) and prepared a memorandum theorizing how the paint came to be on the shorts. The presence of paint was not revealed to petitioner.

The shorts were sent to Litterly shortly after being found. He cut out two small squares from the shorts (R. 508) and tested them for blood.

A sample of the blood of Janice May was sent to Litterly on November 28, 1955, but upon arrival, it was so deteriorated that it could not be typed (Pet. Ex. 6).

At the 1956 trial Litterly testified that there was Type A blood on the shorts (Abst. 268-271). He did not reveal the presence of the paint nor did any prosecution witness reveal this fact. Court and jury were led to believe that all the stains were blood. Thus the prosecution was not required to explain how or why the paint came on the shorts.

Ownership of the shorts was sharply disputed at the 1956 trial.[1] Petitioner maintained that he wore boxer shorts, not jockey shorts, and supported his contention with substantial evidence. The question was whether the jockey shorts were petitioner's or a garment abandoned in the "flats" having no connection with the crime.

At the hearing in the District Court, petitioner for the first time was able to obtain a court order authorizing a scientific examination of the physical evidence by an expert of his selection, Mr. James Martin. This expert established that all the heavy stains were, in fact, paint, not blood. Further, the expert was unable to find any evidence of blood on the shorts (R. 624-631).

Review of documents produced in the District Court pursuant to the subpoena duces tecum revealed a police memorandum discussing the paint on the shorts. In the District Court the prosecution admitted that in 1956 it had known of the paint (R. 580).

As stated above, at the 1956 trial, Litterly gave an unqualified opinion that there was Type A blood on the shorts and that petitioner had Type "O" blood. In his report of December 7, 1955, however, Litterly had expressed an unqualified opinion regarding petitioner's "O" blood, but had stated that the blood on the rock was "probably of Group A." (Pet. Ex. 6). Prosecutor Blaine Ramsey was aware of the "probable" qualification in the report (R. 122). When Litterly testified, the prosecution failed to call the court's attention to his shift in opinion, even though Mr. Ramsey was there in the courtroom (R. 123).

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[1] In the District Court, a man with experience in men's clothing testified that the jockey shorts would have been too small to fit petitioner and that they would have been extremely tight and uncomfortable (R. 181).

At the 1956 trial, the mother of Janice May testified that Janice had Type A blood. This testimony, however, was hearsay and was known to be such by the prosecution (R. 100-103). There was no disclosure at the time, that it was hearsay (R. 65).

(c) **Betty Baldwin Curry.**

The principal witness for the prosecution in the 1956 trial was Betty Baldwin, now Mrs. Betty Baldwin Curry. In 1956 her testimony was that on the night of November 26, 1955, she had ridden as a passenger in petitioner's taxi cab from Canton to St. David and that during the course of that trip petitioner had admitted the crime to her. For convenience, her 1956 testimony is re-printed in R. 701-722.

In the District Court, Mrs. Curry recanted completely her 1956 testimony, stating that she had lied on that occasion. She related in detail her interviews with the police following the crime, the manner in which she came to give a false story and her subsequent abortive efforts to retract prior to her appearance on the stand.

In the District Court, through discovery and through testimony of prosecution witnesses, petitioner learned for the first time the facts related below regarding Betty Baldwin Curry, all of which were known to the prosecution before the 1956 trial. These facts impune her credibility. None of these facts were revealed to court or jury.

1. In February, 1956, about seven months before the trial, Betty Baldwin Curry told the prosecution a lengthy story related to the delivery and sale of narcotics. The

authorities investigated the tale and concluded, correctly, that the story was false.[1] (R. 413, 419, Pet. Ex. 5)

2. In March, 1956 Betty Baldwin Curry threatened to leave town. The prosecution used "extra-legal methods" (R. 556), including jailing her for a time (R. 460), to prevent her from doing so.

3. In July, 1956 Betty Baldwin Curry gave a false affidavit to the prosecution charging that defense counsel had threatened her unless she testified favorably to the defense at the trial (R. 453-455). She falsely told the prosecution that defense counsel had offered her $10,000 if she would help get petitioner off. (R. 455).

4. After the taxi ride with petitioner when petitioner supposedly confessed the crime to her, she did not report to the police but after she left petitioner, spent the night with a man she had just met (R. 266, 268, 269, Pet. Group Ex. 2).

5. For some time after making her statement to the police, Betty Baldwin Curry lived on cash received from the sheriff's office and later on a job obtained for her by the sheriff (A. 286-290).

6. A few days before the trial, in September, 1956, the prosecution falsely told Mrs. Curry that possibly she was deeply involved with petitioner because they could not prove where she was at the time petitioner left Canton. This was false because the facts in (4) above were known to the prosecution (R. 267, 270).

7. Two women deputy sheriffs (R. 599) took Mrs. Curry to Carthage to testify in September, 1956. No other wit-

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[1] In the District Court, in 1963, the prosecution referred to a memorandum in the files of the State Bureau of Criminal Indentification—prepared by James Christensen (R. 420). This memorandum, not put in evidence, summarizes Mrs. Curry's statement to Mr. Christensen.

ness at the trial was so treated (R. 600). The reason was, as explained by Fulton County Sheriff Vincent Ball, "We were trying to treat her with all the courtesy that was possible through our office." (R. 600)

Just before Mrs. Curry testified in 1956, the prosecution moved, outside the presence of the jury, to call her as a court's witness. This motion was denied (Abst. 241-2). None of the foregoing facts were disclosed to the court as ground for this motion.

8. Immediately after giving her name, address and occupation, Betty Baldwin Curry falsely testified that she had known petitioner for approximately two years. In fact she had known petitioner for 5 weeks before November 26 (R. 94, 247, 258, 245) and the prosecution had her signed statement of November 30 to this effect. This falsehood was not revealed by the prosecution to the court or jury (R. 94-5).

(d) Petitioner's landlady and other alibi witnesses.

In August, 1963, before the Parole Board commutation hearing, petitioner and the prosecution produced evidence bearing on the issues at bar. That evidence was admitted by the District Court. The prosecution fixed the crime at 4:00 P.M. (R. 832). Petitioner's defense was that he worked the night before the crime and that he was in his room during the entire afternoon of November 26 until he left at 4:30 P.M.

Respecting petitioner's alibi, a key person was Mrs. Alice Baxter, petitioner's landlady.

Mr. William Malmgren, then petitioner's attorney, interviewed this witness before the 1956 trial but before covering with her all topics of inquiry, she told him that Mr. Blaine Ramsey, the State's Attorney had told her she didn't have to talk to him (R. 943). Mr. Malmgren was

never able to learn more. At the 1956 trial the defense sought leave to call Mrs. Baxter as a court's witness (Abst. 286) but would not meet the Court's condition that the defense state she was unreliable. Without knowing what her evidence would be, the defense could not afford to call her and risk being bound by her testimony (R. 215).

During the Parole Board hearing in 1963 petitioner learned the full story about the State's Attorney's representations to Mrs. Baxter and the testimony which Mrs. Baxter would have told if she had been called in 1956. On cross-examination Mr. Ramsey stated that he told "many, many witnesses, including Mrs. Baxter," "they had a constitutional right not to talk to anyone and they should make up their own mind whether they should or not." Further, he testified that he advised some persons who had been interviewed by counsel for the defense to say, "I already told you what I know. I'll tell the rest in court." (R. 198)

The following testimony of Mrs. Baxter was thus obtained for the first time at the commutation hearing;

Petitioner could not have committed the murder at 4:00 p.m. because he was in his room until 4:30 p.m. and the scene of the crime was about 6 or 7 blocks away (R. 834).

At 4:30 p.m. petitioner came downstairs and Mrs. Baxter then requested petitioner to go to Lewis Pharmacy to have a prescription refilled (R. 820). He took the prescription and the money, was gone about half an hour to 45 minutes, returned with the prescription and the change, declined to take pay for his trouble, and left. Mrs. Baxter further corroborated the testimony of petitioner (Abst. 403) and his mother, Mrs. Jewel Miller (Abst. 330-40) that petitioner always wore boxer-type shorts. Jockey-type shorts were the type found in the Van Buren flats

and admitted at the 1956 trial. While in court, she saw the jacket found in the creek. She had never seen petitioner wear such a jacket (R. 822).

Both Rebecca Watters (R. 857) and Adrian Watters (R. 876), then both children, corroborated their grandmother's testimony. The event was fixed in Rebecca's memory (R. 864). Mr. Baxter was not available as a witness before the Parole Board (R. 816) but testified in the District Court (R. 184). His testimony was substantially the same as that of his wife and grandchildren.

(e) The visit to the pharmacy.

It was the prosecution's theory that between 5:15 and 5:45 p.m. (Abst. 315 et seq. R. 43, 54) petitioner picked up clothing at a cleaners, returned to his room, changed clothes, tried to retrieve the shorts in the abandoned building, threw the bloody garments in the boxcar of a train passing Maple St.[1], and returned to his room. (Abst. 225)

No testimony was presented by the prosecution that during that half hour, petitioner was in a drug store obtaining a prescription for his landlady. Yet the prosecution knew this to be true.

Before the Parole Board in 1963 the prosecution called as its witness Edward R. Lewis, Jr., of Lewis Pharmacy. He submitted an affidavit that petitioner was in the store to fill a prescription at 5:25 p.m. (R. 975) and left the store about 5:30 p.m. (R. 986)

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[1] No train passed this point between 5:15 and 5:45 p.m. Despite intensive search, no clothing was ever found in a boxcar, nor in the river at Pekin where, the confession says, pants and a shirt were thrown. (Abst. 315, 321, R 43, 54)

In response to a question by a member of the Parole Board whether petitioner was distressed or acting unnaturally, Mr. Lewis said, "No, I was much too busy to even—he was just like any other customer that would come in and would look like anyone else." (R. 984)

Mr. Lewis related the above facts to the prosecution almost immediately after the crime but was not called as a prosecution witness.

Defense counsel also interviewed Mr. Lewis shortly after the crime. To Mr. Malmgren, Mr. Lewis said that "He (Lewis) had no personal knowledge of Mr. Lloyd Eldon Miller having entered the store . . ." (R. 945)

REASONS FOR GRANTING THE WRIT.

I.

In a capital case the Court of Appeals sanctioned prosecution suppression of physical evidence favorable to the accused and sanctioned misleading testimony by a prosecution expert.

Its holding is contrary to the holdings of this court and in conflict with holdings in other circuits.

(a) Concealment of the hair.

This capital case presents a nearly unbelievable spectacle: a murder and sexual assault is committed on a child. The authorities immediately after death using a paper tissue take a vaginal smear from the child. There is a hair on the tissue. Petitioner is a suspect. The authorities make a scientific comparison of the hair and one of petitioner's pubic hairs. They are found not to match. Nonetheless, to induce confession petitioner is told falsely that the hairs match and petitioner is tried for the crime. His counsel move to make a scientific examination of the physical evidence. The prosecution resists. The trial court denies the defense motion and the Supreme Court of Illinois affirms.

Through the discovery processes of the District Court, the facts of suppression are revealed. Yet the Court of Appeals refuses to hold that petitioner's constitutional right to due process has been violated.

Such decision is directly contrary to the decision of this Court in *Brady* v *Maryland*, 373 U.S. 83 (1963). There, in Brady's trial for murder, the prosecution suppressed a statement of an accomplice that the accomplice had done the actual shooting. This Court said, 373 U.S. at 87:

"... the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Moreover, the decision below is directly contrary to two Third Circuit Court decisions, both of which were cited with approval by this Court in *Brady*: *United States ex rel. Thompson* v. *Dye*, 221 F. 2d 763, cer. den. 350 U.S. 875 (1955) (held constitutional denial for prosecution to permit officer to testify that prisoner was not drunk when arrested when prosecution had contrary information from other officers. The issue went to intent.) and *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (1952), cert. den. 345 U.S. 904 (1953) (Commonwealth produced evidence tending to show that Almeida and not a co-conspirator had fired a fatal shot. It knew Almeida had been armed with a .45 and concealed the existence of a .38 calibre bullet which killed the deceased. The Court concluded that Almeida "had been overreached and... denied due process...." 195 F. 2d at 819).

The decision below moreover is contrary to holdings of other Circuits. In *Ashley* v. *Texas*, 319 F. 2d 80 (C.A. 5th, 1963), cert. den. 375 U.S. 931 (1963), the Court granted relief upon habeas corpus where the state failed to reveal to defendant that before trial he had been found mentally incompetent by a third set of doctors after two prior sets had found him sane. In *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (C.A. 2nd, 1964), a defendant was convicted of robbery on the testimony of two eyewitnesses. After trial defendant's counsel learned that two other eyewitnesses questioned by police had categorically denied that defendant was the robber. The conviction was set aside. In *Barbee* v. *Warden*, 331 F. 2d 842 (C.A. 4th, 1964), defendant was convicted in a state court of shooting a police officer. Prosecution witnesses identified de-

fendant's revolver as "similar" to the one used in the shooting. Subsequently, defendant established that the prosecution knew that the fatal weapon was of different calibre from defendant's and that relevant fingerprints were not defendant's. The conviction was set aside upon habeas corpus.

Every one of the foregoing cases was cited to the Court of Appeals. It did not mention a single one. Instead it indulged in conjecture (Slip. op. p. 8) 342 F. 2d at 652, postulating various theories disconnecting the hair from the crime (e.g. that the hair came from "divers doctors"). This approach we think is shocking. (1) The Court of Appeals erroneously purported to sit as a Hancock County jury. (2) On the evidence its conclusions seems most remote. Consider these facts:

The vaginal smear on the tissue was taken by the County Coroner, a physician (Abst. 90), during an examination of the body begun 37 minutes after death while the body was still on the operating table. The notation on the container (Pet. Ex 6) was "Janice May, 11/26/55, Dr. R.J.M."[1]—clearly the initials of the coroner, Dr. Raymond J. Mercey.

Had the existence of the container and the label been known to the defense in 1956, no doubt Dr. Mercey would have been asked to confirm the facts about its discovery stated by Litterly.

Janice May was eight years old. The finding of a human hair on a tissue used to obtain a vaginal smear immediately after she had been attacked sexually certainly might have caused the jury to conclude that the hair was from her attacker. This was not a hair found on the *surface* of the body which might have been accidentally deposited by

[1] The Court of Appeals erroneously states the initials as "Dr. R. J. H." (342 F. 2d at 652)

individuals handling the body. The defense was entitled to present to the jury the fact that the hair had been found and that it was not petitioner's.

(b) The false statement to petitioner that the hair was his.

A lie was told petitioner to weaken his will to resist his interrogators. While under questioning, he was told that the hair found in the body of the deceased matched his pubic hair. This statement was false. The prosecution knew it was false or made it without bothering to ascertain the truth from Litterly, as part of its pressure tactic against petitioner.

This Court has stricken confessions for similar subterfuges by the prosecution. *Spano* v. *New York,* 360 U.S. 315 (1959) (police officer played on sympathies of defendant), and *Leyra* v. *Denno,* 347 U.S. 556 (1954) (psychiatrist, pretending to treat sinus condition, used to break will of defendant), are two examples.

The Court below did not mention either of these holdings, both of which were cited to it. Instead, the Court below argued that petitioner was not intimidated because after looking at the hairs through a microscope, he denied the hairs matched (Slip op. 12-13, 342 F. 2d at 654). (Petitioner's exact words were, "Them hairs don't match. . . . Them hairs don't belong to me." (Abst. 162).) Petitioner was a cab driver who had not finished high school. What were his qualifications to judge the hairs? What weight would the jury have given his testimony?

(c) Concealment of the fact that the shorts were paint-stained rather than blood-stained.

No doubt impressive evidence against petitioner were the so-called blood-stained shorts. As the exhibits have been transmitted to this Court, we ask this Court to examine this garment (Pet. Ex. 9). In light of the record, one

would assume that the shorts were indeed "blood-stained." Again availing himself of the discovery processes of the district court, petitioner learned for the first time through an expert witness the shocking fact that the "blood-stained shorts" were not blood-stained at all but were paint-stained shorts (see pp. 7-8, *ante*).[1]

The prosecution knew almost from the first that the stains were paint, not blood, and yet this fact was not revealed to court or jury. The jury was inflamed because it was led to believe that the stains were the blood of the child.

Further, the prosecution's theory was that petitioner, after committing the crime, hastily abandoned the "blood-stained" shorts. This theory fails to explain the paint. If had to explain its presence. The prosecution, aware of this problem, prepared a memorandum which speculates as to how paint came on the garment.

We think, that at the least the prosecution had a duty to reveal the paint, to the court, jury and petitioner, for the prosecution had successfully blocked petitioner from access to the physical evidence and thereby precluded him from ascertaining the facts for himself.

The cases cited in subpart (a) are equally authoritative here. Misrepresenting paint as blood is similar to the prosecution's representing—perhaps truthfully—that the murder weapon was "similar to" the defendant's—when it knew that defendant's gun, in fact, was not the murder weapon. *Barbee* v. *Warden*, 331 F. 2d 842 (1964).

Ownership of the shorts was a sharply contested issue at the trial (see p. 8, *ante*). Petitioner vigorously denied that they were his. Had the jury known of the paint, and

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[1] It is questionable whether there is or was any blood on the shorts (R. 642).

its unexplained presence, it might well have believed petitioner. His testimony would have been corroborated by Mrs. Alice Baxter (see p. 12, *ante*), his landlady, but for the prosecution's wrongful action in effectively depriving petitioner of her testimony.

The prosecution never bothered to try the shorts on petitioner (R. 222), and with good reason, for it appears that the jockey shorts were too small to fit petitioner (see p. 8, *ante*).

(d) Misleading testimony and hearsay testimony regarding blood types.

Mr. Litterly testified in categorical fashion that the blood found on the shorts was type "A." Mrs. Jeanne May, mother of Janice May, testified categorically that her daughter had type "A" blood. The jury was led to infer that the blood on the shorts, which the prosecution endeavored to link to petitioner, was the child's blood. What the prosecution knew, but suppressed at the trial, was that Litterly previously had reported only that the blood "was probably Group A." (see pp. 7-9, *ante*).

Thus, an expert witness for the prosecution made an unqualified statement on the stand after he had previously made a guarded statement in his report. Yet the prosecution made no effort to put the whole truth before the court and the jury. The Court of Appeals dismissed the matter as a matter of writing style, (342 F. 2d at 652), but failed to note that in the same respect Litterly stated petitioner's blood type ("o") *without qualification.* (Pet. Ex. 6) Hence the "probable" qualification was not merely a scientist's caution.

Here again, the prosecution indulged in the technique condemned in *Alcorta* v. *Texas,* 355 U.S. 28 (1957)—in reverse. Here there was a conscious overstatement (sure-

ness of scientific opinion); there, conscious understatement (the witness had only a casual relationship with defendant's wife). The other cases cited in part (a) enunciates such overstatement is particularly heinous where, as here, the prosecution barred petitioner from making his own scientific examination and therefore petitioner was at the mercy of the prosecution chemist, the prosecutor's duty to deal openly and fairly with the defendant, the judge and the jury are relevant here.

In light of the uncertainty of the expert witness regarding the blood type on the jockey shorts, the prosecution's knowing use of hearsay testimony to establish the child's blood type takes on new significance (see p. 9, *ante*). There was no competent evidence as to the child's blood type and no sure evidence regarding the blood on the shorts. Thus, this key link in the prosecution's case collapses.

II.

In a capital case the Court of Appeals sanctioned the prosecution's calling as its key witness a person known to it to be unworthy of belief and who later recanted her testimony. To the knowledge of the prosecution she lied on the stand. Its holding is contrary to the holdings of this Court.

Unquestionably the testimony of Mrs. Curry to the effect that petitioner had admitted the crime to her weighed heavily against petitioner and may well have been the deciding factor in the jury's mind. The prior Court of Appeals' decision rests heavily on it (300 F. 2d at 416, n. 2).

In the District Court Mrs. Curry recanted her original testimony at the 1956 trial.

The record is manifest that the prosecution knew in 1956 that Mrs. Curry was untrustworthy and nevertheless called her to the stand (see pp. 9-11, *ante*).

Incident after incident had alerted the prosecution to her untrustworthiness. The actions of the authorities themselves before trial shout out knowledge of her character in 1955-56. In February, 1956, Mrs. Curry volunteered to the authorities a tale about delivery and sale of narcotics. The officials properly judged the story false. In July, 1956, she gave the prosecution a false affidavit that defense counsel had made threats to her unless she favored the defense in her testimony. At the same time she falsely charged counsel with a bribe offer. The prosecution, aware of her character, used "extra-legal" methods, including jailing to prevent her from leaving town. For a time, they gave her cash and later got her a job. Just before the trial in September, 1956, they told her falsely that she might be involved because they could not prove where she was the night of the crime. In fact, the prosecution knew that immediately after petitioner's purported confession to her, she spent the rest of the evening with a man she had just met. She was escorted to court by two bailiffs. Aware of her unreliability, the prosecution asked to have her called as a court's witness. The motion was denied, but the jury was not informed of the prosecution's want of confidence in her (Abst. 241-2).

This Court has not had occasion to consider whether the calling of an unreliable witness is, *per se*, a violation of due process under the Fourteenth Amendment. In *Mesarosh* v. *U.S.*, 352 U.S. 1, 77 S. Ct. 1 (1956), this Court set aside a conviction under the Smith Act, where after the trial the chief prosecution witness gave bizarre, unbelievable testimony before other tribunals and thus impugned the truthfulness of his trial testimony.

Petitioner's case is stronger, for here unreliability of the witness was known to the prosecution before trial and on the stand. In a non-criminal matter this Court set

aside a judgment where it later appeared based in part upon untrustworthy witnesses. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956).

Since these were federal cases this Court could rest decision on its supervisory jurisdiction over the federal courts. Thus, the Fourteenth Amendment due process question remains open. It is important, deserving the attention of this Court.

Once on the stand, Mrs. Curry began her testimony with a falsehood, known by the prosecution to be such: that she had known petitioner for *about two years* when the prosecution had her signed statement of November 30, stating that she had known petitioner *about five weeks*. This falsehood was material: If Mrs. Curry had known petitioner for two years, the jury could conclude that petitioner might confess to her, whereas the jury might be skeptical of such a statement to a stranger. Despite this patent perjury, the prosecution remained silent. Not until institution of the *habeas corpus* action, when for the first time petitioner had access to the discovery procedures of the federal court, did the facts regarding this deception come to light.

The Court of Appeals failed to heed the teaching of this Court that a conviction obtained by evidence, known to the prosecution to be false, is void and in violation of due process under the Fourteenth Amendment to the United States Constitution. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Mooney* v. *Holohan*, 294 U.S. 103 (1935). In *Napue*, a witness who was an alleged accomplice testified falsely to increase his credibility that he had received no promise of consideration in return for testifying against defendant.

This principle has been extended by this tribunal: it is the duty of the prosecutor to avoid half-truths or mislead-

ing statements, and to correct any testimony which is not completely and totally truthful. *Alcorta* v. *Texas*, 355 U.S. 28 (1957). There defendant admitted killing his wife when he surprised her kissing one Castilleja, claiming it was murder without malice. Castilleja testified that he had only a casual relationship with defendant's wife. In fact, Castilleja had informed the prosecution he had been intimate with her. The conviction was set aside.

Similarly, the Court below disregarded *Curran* v. *Delaware*, 259 F. 2d 707 (C.A. 3rd, 1958), where a rape conviction was set aside after a police officer falsely stated that only one statement had been taken from accused, when there had been others, which were destroyed by the police. The court said:

> ". . . the trial of a capital case, or indeed any other trial, no longer can be considered properly a game of wits and skill." 259 F. 2d at 711.

It was precisely this principle that the Court below overlooked on this question and on many others.

The Court of Appeals seeks to dismiss the Betty Curry issue. It argues (Slip op. 4, 342 F. 2d at 649) that her credibility was assailed at the trial. So it was, and defended by the prosecution. But, and this is the nub: the prosecution was defending her credibility when it *knew* she was not worthy of belief. This was the constitutional violation. Further, testimonial exegesis (Slip op. 4) about the "two years" lie helps nothing. Wasn't the jury entitled to assume two years meant two years of meaningful friendship? Wasn't that fairly implied?

The Court below relies heavily on its decision in *U.S. ex rel. Rooney* v. *Ragen*, 173 F. 2d 668 (1949) (Slip op. 5-6, 342 F. 2d at 651). There at least there was no showing,

as here, of prosecution use of known perjured testimony by the witness.

What marks this case off from *Rooney* is that here there were additional facts impeaching Mrs. Curry's reliability *known only to the prosecution* (e.g., the lies regarding narcotic sales). In any event, *Rooney* does not commend itself where life hangs in the balance.

The Court of Appeals' reliance on *Hysler* and *Cobb* is misplaced. *Hysler* v. *Florida*, 315 U.S. 411 (1942) (see Slip op. 6), held only that a hearing need not be granted on the allegations of a post trial petition. In *Cobb* v. *Hunter*, 167 F. 2d 888 (C.A. 10th, 1948) (Slip op. 7), there was no proof of prosecution's knowledge of perjury.

III.

In violation of petitioner's right to a fair trial, the prosecution obstructed defense counsel from interviewing prospective witnesses and thus depriving him of four alibi witnesses. Court of Appeals sanction of such practice is contrary to the holdings of this Court.

Petitioner's landlady, at the 1963 hearing before the Parole Board, confirmed petitioner's alibi that he was home at the time of the crime. Such testimony was not available to the defense in 1956, because Mr. Ramsey wrongfully informed Mrs. Baxter, before defense counsel had concluded interviewing her, that she had a "constitutional right" not to talk to counsel. The message as understood by Mrs. Baxter was, "You don't have to tell him anything" (R. 848). As a result, "I never did tell him anything" (R. 848).

Mr. Ramsey's statement no doubt was wrong.[1] What Mr. Ramsey failed to say was that Mrs. Baxter undoubt-

[1] Criminal discovery rules if adopted could require a witness to speak just as civil discovery rules do. One has no "constitutional right" to refuse to speak where there is a right in the courts and the legislature to require him to speak.

edly had a constitutional right *to* speak to Mr. Malmgren. But we cannot view Mr. Ramsey's statement as a mere erroneous proposition of constitutional law. The implication clearly was, "You should not speak to Mr. Malmgren." Such conduct of the prosecution in a capital case is little short of reprehensible. The prosecution knew that in a criminal case the defense has no right to take discovery depositions. The prosecution knew, further, that the defense could not take the risk of calling a witness to the stand without knowing what her testimony would be. In fact, when petitioner sought to call Mrs. Baxter as a court witness, the prosecution objected. Hence, it was of crucial importance to the defense that they be allowed to interview fully every witness in advance.

Nor is that the end of the matter. Being cut off from Mrs. Baxter, the petitioner was deprived of the corroboration of her two grandchildren and her husband, all of whom subsequently testified in the District Court below and before the Parole Board.

The Court of Appeals' view (342 F. 2d at 653-4, it would require petitioner to call a Mrs. Baxter not knowing her testimony. If it had been adverse, the effect on the jury would have been catastrophic. Mr. Baxter and the grandchildren were unavailable at the trial because the prosecution impeded access to Mrs. Baxter. The Parole Board did not resolve a legal issue (see 342 F. 2nd at 653), rather testimony before the Parole Board was introduced in the District Court by stipulation to save court time.

We think that the conduct of the prosecution subverted the due process right to fair trial and the Sixth Amendment guarantee of the right to compulsory process for obtaining witnesses favorable to the accused and the right to counsel. Those rights are empty shells if the prosecu-

tion may cut off pre-trial interviews by giving the witness false information of his "rights." Petitioner did not dare call Mrs. Baxter as his witness at the trial because he would have been bound by her testimony even though adverse. The impact on the jury doubtless would have been substantial had four impartial witnesses been produced.

This Court appears to have had no occasion to consider the scope of Sixth Amendment rights in this precise context. It is established that the confrontation clause (*Pointer* v. *Texas*, 380 U.S. 400 (1965) and the right to counsel clause of the Sixth are part of due process under the Fourteenth, *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963). This case holds also that an indigent felony defendant has a right to be provided counsel. Effective, not a nominal, appointment is necessary. *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Recently a District Court discharged an indigent defendant where the government refused to furnish funds to enable appointed counsel to take a statement from the chief prosecution witness. *U. S.* v. *Germany*, 32 F.R.D. 421 (Ala. 1963).

Missouri granted a new trial to a defendant where his counsel was refused the right to interview an incarcerated prosecution witness. *State* v. *Berstein*, 372 S.W. 2d 57 (1963).

Over fifty years ago the Supreme Court of Rhode Island held it prejudicial error for the trial court to criticize defendant's counsel for interviewing a state witness. It relied upon a state constitutional provision analogous to the Sixth and Fourteenth Amendments.

"It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to

monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous." *State* v. *Papa*, 32 Rhode Island 453, 459, 80 Atl. 12, 15 (1911).

Other courts in varying situations have enunciated the principle that defendant should not be fettered in the interviewing of witnesses. *Wilson* v. *State*, 93 Georgia App. 229, 91 S.E. 2d 201 (1955); *Walker* v. *Superior Court*, 155 Calif. App. 2d 134, 139-141, 317 Pac. 2d 130, 134 (1957) and *Schindler* v. *Superior Court*, 161 Calif. App. 2d 513, 520, 327 Pac. 2d 68, 73 (1958).

We think inquiry by this court into this question is appropriate in view of the significance of the issue.

IV.

In violation of his constitutional rights petitioner was held incommunicado for over 52 hours, without counsel, until he confessed, not allowed to call his family, told falsely his family did not want to see him and told falsely his hair was found in the body. On such facts, contrary to the holdings of this Court, the Court of Appeals denied relief.

The record is uncontroverted that petitioner was held incommunicado for over 52 hours until he confessed. Over and over he asked to see his family (Abst. 164, 168, 176, 186, 187, 404). The sheriff told him falsely, on November 29, "your mother and dad don't want to have nothing to do with you." (Abst. 216). The statement was repeated on November 30. (Abst. 225). This, coupled with the lie about the hair (pp. 6, 18, *ante*) was intended, and did, weaken the will of petitioner to resist the police. The devices used here were similar to those employed in *Haynes* v. *Washington*, 373 U.S. 503 (1963) but here there was substantial independent evidence of innocence, not guilt. (Cf. 373 U.S. at 518)

There is no doubt that petitioner's repeated requests to call his family looked to the obtaining of counsel. His parents were making efforts to locate their son and had contacted counsel. Not until after the confession was obtained were they allowed to see petitioner (Abst. 333 & 420) and was counsel allowed to see petitioner (Abst. 423). We think the case thus falls within *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The necessity for police avoidance of reliance upon confession, forcefully stated in *Escobedo*, is here demonstrated. Once petitioner could learn the facts the prosecution knew, massive evidence of his innocence came to light.

There are other facets of this case we have not dwelt on as irrelevant to this petition. It is a singular fact that the confession is almost wholly contradicted by known facts: e.g. the confession has petitioner throwing bloody clothing into the boxcar of a passing train when there was no train passing at the time and place mentioned. (R. 321, 1038-39) and the prosecution knew it. The confession failed to lead the prosecution to any corroborating physical evidence. The jacket and shorts mentioned had already been found by the police (R. 571). Yet, the prosecution in closing argument to the jury (R. 577) wrongly stated that the jacket was found because the police went to look where the confession says it was discarded.

V.

Petitioner has met the exhaustion requirements of 28 U.S.C. 2254.

We think it clear that petitioner has met the exhaustion requirements of 28 U.S.C. 2254. His execution was set for August 23, 1963. At the commutation hearing concluded about August 13, 1963, petitioner first learned significant facts establishing violation of constitutional rights. An

application for stay of execution was made to the Supreme Court of Illinois which was denied on August 22. Had not the District Court granted a stay that same day, petitioner would have been dead. As we show above, at the hearing in the District Court, through federal discovery processes, many of the facts heavily relied upon here, first were uncovered—the suppression of physical evidence, prosecution's knowledge of Mrs. Curry's unreliability, etc. In such case, we think the proper administration of justice requires the federal court to proceed to relief. The alternative is to say to petitioner that the federal court, having discovered the evidence, now remits petitioner to a state remedy. Piecemeal litigation is disfavored even in civil actions. *Case* v. *Borak*, 377 U.S. 426 at 434 (1964). To require it of an indigent prisoner under death sentence, with the added burden of delay and expense would be most unfortunate.

On June 18, 1965, petitioner was compelled to file a protective petition in the Circuit Court of Hancock County. Under Sec. 72 of the Illinois Civil Practice Act, and relied upon in part in the petition, such petition must be filed within two years of the date fraudulently concealed facts first became known to petitioner. Some of the facts here mentioned first came to light shortly before the Parole Board hearing in August, 1963. On the facts here, petitioner should not be compelled to secure his evidence in one court and try the case in another. *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837 (1963), teaches that exhaustion is tested by the remedies still open to petitioner when he seeks habeas corpus. The exhaustion doctrine requires practical, not mechanical, application. Its raison d'etre is comity: but where the constitutional infirmity is discovered through federal court process, the comity consideration loses its force. There was no state

proceedings open to petitioner to unearth the facts concealed by the prosecution. Even his modest trial court request to have scientific examination of the evidence was denied and the denial affirmed by the Supreme Court of Illinois. The case here is not like *Jackson* v. *Denno*, 378 U.S. 368 (1964), where this court first determined the constitutional standard and then permitted a state court to make a factual determination. Here the issue is one of law. Nor is it like *Case* v. *Nebraska*, 33 LW 4498 (1965), where the state provided a new remedy in a case arising from a state court.

Here, moreover, the prosecution may seek in the State courts to impose roadblocks to the adjudication on the merits of petitioner's claims, asserting that some, or all of them cannot be raised. Petitioner's case is novel, if not unprecedented, in that years after conviction, there should come to light proof upon proof of constitutional deprivation. If petitioner succeeds in the State trial court, the prosecution may again seek to appeal as it did to the Court of Appeals. Remitting petitioner to such a remedy would be most unfortunate.

CONCLUSION

Petitioner prays that this Court grant this petition for certiorari, reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court.

Respectfully submitted,

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